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No. 97-1435

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

MARGARET DONG,
Petitioner,
v.
SMITHSONIAN INSTITUTION HIRSHHORN MUSEUM AND SCULPTURE GARDEN,
Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE *AMICUS CURIAE* AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Smithsonian Institution (SI) is subject to the provisions of the Privacy Act and Freedom of Information Act by virtue of its being an "authority of the United States," when the SI is federally chartered, relies upon the federal government for the majority of its funding, depends upon federal employees to staff the majority of its positions, and is subject to executive branch audit and budgetary requirements to fulfill its statutory obligation to "increase . . . knowledge" by serving as a repository for the study, display, and preservation of national treasures and artifacts?

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PRELIMINARY STATEMENT

Pursuant to Supreme Court Rule 37, written consent of the parties having been obtained and filed with this brief, the American Federation of Government Employees, AFL-CIO, files this brief as *amicus curiae* in support of the petition for a writ of certiorari filed by petitioner, Margaret Dong.

INTEREST OF THE AMICUS CURIAE [1]

The American Federation of Government Employees, AFL-CIO (AFGE) is a labor organization which represents approximately 700,000 civilian employees of the federal government. AFGE is the largest labor organization of non-postal federal employees and represents workers in nearly every major department and agency of the federal government, including the Smithsonian Institution (SI), where petitioner, Margaret Dong, is a bargaining unit employee represented by AFGE Local 2463.

In its capacity as exclusive bargaining representative, AFGE negotiates personnel policies, presents administrative grievances and complaints, litigates in federal courts, and engages in legislative activity on behalf of the employees it represents. A further part of AFGE's duty as an exclusive bargaining agent is to assure that the employees it represents are accorded all the rights and protections they are entitled to under applicable collective bargaining agreements and pertinent federal laws, rules, and regulations. This obligation includes assuring that petitioner Dong and her fellow SI employees can exercise not only the right to privacy guaranteed them in the Privacy Act under 5 U.S.C. § 552a(e), but also other statutory rights indirectly implicated by the petitioned-from decision, such as rights under the Freedom of Information Act (FOIA), 5 U.S.C. § 552.

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[1] In compliance with Sup. Ct. R. 37.6, the *amicus* states that counsel for the American Federation of Government Employees, AFL-CIO prepared this brief in its entirety. No other person or entity contributed to its preparation or made any monetary contribution to the brief's preparation or submission.

The effect of the court of appeals' holding in *Dong v. SI*, 125 F.3d 877 (D.C. Cir. 1997) (*Dong*) is both to deny the statutory right to privacy under the Privacy Act for over 4,000 employees at the SI and to remove the SI from the purview of FOIA, denying employees and the public alike access to the SI's repository of information, because the two laws share the same definition of "agency." *See* 5 U.S.C. § 552a(a)(1) (cross referencing the term agency as defined in 5 U.S.C. § 552(e).[2] Among other concerns, in this case AFGE is concerned with protecting the privacy rights of its members and with assuring its members' access to information regarding the SI and its activities.

As an organization, AFGE is committed to protecting the constitutional and statutory rights of federal employees and to obtaining redress when those rights have been violated. Because the petitioned-from decision vitally affects federal employees' privacy rights and their rights to information collected by the SI, AFGE has a direct and compelling interest in the outcome of this litigation which justifies its intervention as an *amicus curiae*.

SUMMARY OF ARGUMENT

The petition before the Court raises several important issues which merit this Court's attention.[3] First, the petitioned-from decision raises an important issue of statutory construction which has been a source of confusion for the

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[2] 5 U.S.C. § 552a(a)(1) actually references 5 U.S.C. § 552(e), which was redesignated 5 U.S.C. § 552(f) in section 1802(b) of Pub. L. No. 99-570 (1986).

[3] Several circuit judges have indicated their support for this Court's consideration of the matter:

> Although I have considerable doubts about the panel's conclusion that the Smithsonian Institution is not an "authority of the Government of the United States," I do not think an *in banc* hearing would render any different result. I hope that the *Supreme Court* (or the Congress) will take a hard look at the issue.

Dong v. Smithsonian Institution, 125 F.3d 877 (D.C. Cir. 1997), *reh'g denied*, No. 96-5303 (D.C. Cir. Dec. 3, 1997) (Statement of J. Wald; J. Tatel, concurring) (emphasis added).

circuit courts of appeals. Different circuits have disagreed on the proper test for determining the "agency" status of an entity for defining coverage of federal law. This issue has arisen frequently in multiple contexts and will continue to be raised until this Court sets out an authoritative determination of what it means to be an "agency." *See, e.g., Rivera v. Heyman*, No. 96civ4489 1997WL 620837 (S.D.N.Y. Oct. 7, 1997) (defining "agency" under the Rehabilitation Act of 1973, § 501, 29 U.S.C. § 791; the Civil Rights Act of 1964, Title VII, § 717, 42 U.S.C. § 2000e-16; and 5 U.S.C. § 105); *Expeditions Unlimited Aquatic Enterprises v. SI*, 566 F.2d 289 (D.C. Cir. 1977) (defining "agency" in the Federal Tort Claims Act, 28 U.S.C. § 2671); *Rocap v. Indiek*, 539 F.2d 174 (D.C. Cir. 1976) (defining "agency" for the FOIA, 5 U.S.C. § 552). The D.C. Circuit's holding in *Dong* erroneously departs from the test of substantial government control it announced in *Rocap*, which is the test adopted by the Ninth Circuit. The confusion this split has created should be resolved.

The second important issue is the evisceration of SI employees' rights—to privacy and to access information held by the SI—occasioned by the court of appeals' decision. Congress has determined that privacy rights and the ability to access information about the government are essential and primary rights.[4] Therefore, if the D.C. Circuit's holding in *Dong* is not reviewed, the statutory rights of the SI's employees will continue to be seriously and unlawfully impaired.

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[4] *See* the Privacy Act of 1974, Congressional Findings and Statement of Purpose, § 2(a)(4), Pub. L. No. 93-579, 5 U.S.C. § 552 ("The Congress finds that the right to privacy is a personal and fundamental right protected by the Constitution of the United States"), *reprinted in* 1974 U.S.C.C.A.N. 2178. *See also* the letter of the late Representative William L. Dawson creating the Special Subcommittee on Government Information: "An informed public makes the difference between mob rule and democratic government. If pertinent and necessary information on government activities is denied the public, the result is a weakening of the democratic process. . . ." H.R. REP. No. 876, 93rd Cong., 2nd Sess. 8 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6267, 6268.

A third issue of significance is the potentially adverse impact of the petitioned-from decision on the current relationship between the SI and its employees in areas other than privacy and access to information, such as the whole panoply of rights and protections set out in Title V of the United States Code. The D.C. Circuit's holding in *Dong*, rather than settling a controversy, further confuses the status of the SI and its relationship to other government agencies.

ARGUMENT

I. THE DECISION BELOW PRESENTS A SIGNIFICANT ISSUE OF STATUTORY CONSTRUCTION; THE D.C. CIRCUIT COURT OF APPEALS' DRAMATIC DEPARTURE FROM ITS PRECEDENT UNLAWFULLY AND WRONGFULLY INTERPRETS THE DEFINITION OF "AGENCY" IN FOIA AND THE PRIVACY ACT SO AS TO DEPRIVE THE SI'S EMPLOYEES OF THE PROTECTION OF THOSE LAWS.

Since no definitive judicial or legislative definition of "agency" has been promulgated as it relates to the Privacy Act and FOIA, the courts have devised their own tests for deciding whether certain government or quasi-government entities qualify as agencies under these statutes. The absence of a uniform test has produced a multiplicity of tests, which when applied, have produced conflicting results. *See generally*, Richard P. Shafer, Annotation, *The Meaning of the Term "Agency" for Purposes of the Freedom of Information Act*, 57 A.L.R. FED. 295 (1994).

At the most general level, the D.C. Circuit Court of Appeals has now adopted in *Dong* a very rigid, formalist, and narrow definition of "agency," whereas the Ninth Circuit Court of Appeals has employed a more broad and inclusive definition. While these two courts of appeals were previously in rough accord with their respective analytic approaches, the D.C. Circuit's holding in *Dong* charters a new approach and rejects its earlier, more expansive construction of "agency" articulated twenty years

ago in *Rocap*, 539 F.2d at 177 (While no one characteristic suggests agency status under FOIA, multiple factors which indicate "substantial federal control over its day-to-day operations" will be determinative.).

Not only do the two circuits differ in their understanding of what it means to be an agency, but the D.C. Circuit misapprehends the remedial intent of the Privacy Act and FOIA, which mandates a broad and expansive reading of their language. *See United States Department of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 494 (1994) ("FOIA reflects 'a general philosophy of full agency disclosure . . .'," citing *Dep't. of Air Force v. Rose*, 425 U.S. 352, 360-361 (1976)). The instant case presents the opportunity for this Court to clarify the test for determining what is, and what is not, an agency and to eliminate the judicial confusion regarding this issue.

A. Congress Intended That Coverage Of Both The FOIA And The Privacy Act Be Construed Broadly.

For the original definition of "agency" in FOIA, Congress used the expansive definition found in the Administrative Procedure Act (APA). *See* 5 U.S.C. § 551(1) ("agency" means each *authority of the Government of the United States*, whether or not it is within or subject to review by another agency. . . .") (emphasis added). By using the broad term "authority" and the general term "government," without specifying a particular branch, Congress intended for FOIA to have sweeping applicability.

Further supporting this broad coverage of FOIA are the 1974 amendments to the Act. In 1974, Congress amended FOIA to "include any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any other regulatory agency." 5 U.S.C. § 552(f). The legislative history of the amendments makes clear that although the language used in the amendment may appear to be more specific,

and thus more restrictive, Congress intended for broad FOIA applicability: "[F]or the purposes of this section [FOIA] the definition of "agency" has been expanded to include those entities which may not be considered agencies under § 551(1) of title 5, U.S. Code, but which perform governmental functions and control information of interest to the public." H.R. REP. No. 876, 93rd Cong., 2nd Sess. 8 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6274.[5] Therefore, any reading of the term "agency" which narrowly circumscribes the definition of "agency" so as to exclude the SI violates the Act's express legislative intent to expand coverage.

Additionally, removing the SI from the scope of FOIA frustrates the specific intent of the statute and contradicts the SI's statutorily defined mission. In this regard, Congress emphasized that entities "which perform governmental functions and control information of interest to the public" should be covered under FOIA. H.R. REP. No. 876, 93rd Cong., 2nd Sess. 8 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6267, 6274. The SI is *the* statutorily designated repository and center of study for the nation's artifacts and heritage. *See* 20 U.S.C. §§ 41, 50, 59, 60, and 77a. As such, it is the quintessential governmental information repository Congress meant to bring within FOIA coverage by the 1974 FOIA amendments, if it were

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[5] In fact, the breadth of the new definition of "agency" greatly troubled the Department of Justice, which testified against any amendment to FOIA during the subcommittee's hearings. Malcolm D. Hawk, then Acting Assistant Attorney General, stated, "We cannot determine from this language whether or not the Act would be extended to include such groups as the American National Red Cross, the Girl Scouts of America, National Academy of Sciences, the Veterans of Foreign Wars, or the Daughters of the American Revolution." Appendix 1—Agency Views, H.R. REP. No. 876, 93rd Cong., 2nd Sess. 8 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6281. If the Department of Justice believed that such non-profit organizations with minimal federal ties as those mentioned in Mr. Hawk's statement might fall within the expanded definition of "agency," surely the SI, with its much more substantial indicia of federal control, does.

not clear that the SI was already covered by the existing statutory definition of "agency."

Moreover, if the SI is exempt from FOIA, it can ignore employees' and citizens' requests for information about how the SI operates, from the research it undertakes to the national treasures it possesses. Such an outcome is clearly contrary to the SI's mission. The SI's statutory establishment "for the increase and diffusion of knowledge," and its later acquired role as the custodian of much of the nation's scientific and cultural heritage, together affirm a mission consistent with the public's open access to information under the SI's control. 20 U.S.C. §§ 41, 50, 59, 60, and 77a.

Just as FOIA should be read inclusively, so should the Privacy Act, which seeks to insure that a maximum number of people would receive the privacy guaranteed them by the Constitution. *See* S. REP. No. 1183, 93rd Cong., 2nd Sess. 4 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6916, 6932 ("Privacy, then, is a shorthand term for the restraint on the power of government to investigate individuals."). Integral to the Privacy Act's broad coversage is its definition of "agency," which cross-reference FOIA's definition of agency. *See* 5 U.S.C. § 552a(a)(1). Congress meant for the Privacy Act to share the broad coverage of FOIA. The petitioned-from decision defeats this Congressional intent.

B. In Determining The Agency Status Of An Entity, In *Dong* The D.C. Circuit Has Shifted Inexplicably And Erroneously From The Test Of The Degree Of Federal Control To The Narrow Test Of Executory Function.

In 1976, when the D.C. Circuit had to decide whether the Federal Home Loan Mortgage Corporation (FHLMC) was an agency subject to FOIA, it concluded that the proper inquiry to be made in determining if an entity constitutes an agency under FOIA and the Privacy Act is the amount of "federal control." *Rocap, supra.* In formulating its test, the D.C. Circuit explicitly looked to

Congress' intent in passing FOIA, including the 1974 amendments. 539 F.2d at 177 ("The legislative history . . . reveals that Congress intended to strengthen the Act and expand its coverage to include quasi-governmental entities. . . ."). Applying the standard of "substantial federal control over its day-to-day operations," which was a standard consistent with the expansion of FOIA applicability, the court of appeals looked at both the number and the strength of the links between the federal government and the entity whose status was being determined. *Id.* In reaching its decision, the D.C. Circuit considered whether or not the organization held a federal charter, who appointed its board of directors, who oversaw its financial reporting requirements, and how it received its funding, although none of those factors, by itself, would "be sufficient to trigger" FOIA. *Id.* at 180. Since the FHLMC was federally chartered, had its board appointed by the President, and had its operations controlled by statute, the court of appeals concluded that it had sufficient government ties to qualify as an agency under FOIA. *Id.* at 181.

Departing from twenty years of precedent without explanation, the D.C. Circuit has now adopted a stricter definition of agency which focuses on the *executory functions* of the entity in question to establish, or not, the requisite substantial independent authority. In the case at bar, the court of appeals first looked to the definition of agency found at 5 U.S.C. § 552(f), which encompasses the 1974 amendments to FOIA. The court found it "plain" that the SI was not an executive agency because the Secretary did not answer to the President, administer laws, prosecute offenses, or promulgate rules and regulations, nor "engage in any other typically executive activity." *Dong*, 125 F.3d at 879. The D.C. Circuit thus summarily dismissed both the argument and the factual record below, as found by the district court, demonstrating that the SI is subject to day-to-day federal control and is a governmental entity which performs specific governmental functions and exercises independent decisional authority, such that status as an authority of the government

is warranted. *See Dong v. SI*, 878 F. Supp. 244, 248-249 (D.D.C. 1995) (*Dong I*).

Despite the SI's significant connections to the executive, *Dong*'s new test of agency status under FOIA erroneously limits executive agency status to those institutions which perform broad regulatory, prosecutorial, or adjudicatory functions. The D.C. Circuit recognized that § 552(f) expanded on the original definition found in § 551(1), but then the court proceeded to construe narrowly the term "authority of the government" to require that an entity "exercise substantial independent authority before it can be considered an agency for § 551(1) purposes." *Dong* at 881. Applying this test to the SI, the court of appeals concluded that, since the SI made no generally binding rules nor made determinations of rights and duties through adjudication, it was not an agency. *Id.* at 882.[6]

The new "independent authority" test clearly departs without justification from the court of appeals' holding in *Rocap*. In addition, the decision specifically contradicts the D.C. Circuit's long held view that "administrative entities that perform neither function [rule making or adjudication] are nevertheless agencies, and therefore subject to the public information provisions of the APA, including the Freedom of Information Act." *Soucie v. David*, 448 F.2d 1067, 1073 (1971) (evaluative function of the Office of Science and Technology enough to qualify it as an agency subject to FOIA).

Quite clearly, if the court in *Rocap* had followed the analysis employed in *Dong*, then the FHLMC, which is a hybrid governmental-private entity like the SI, would not have been an agency subject to FOIA because its specialized function of helping families secure mortgages does not meet the D.C. Circuit's formalist definition of either

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[6] Even if the new test were the correct test to apply (which *Amicus* disputes), the D.C. Circuit misapplied its own test. The *Amicus* adopts the argument in this regard set forth in the petition for writ of certiorari, pp. 23-28.

executive power or authority. The contrary is likewise true: if the D.C. Circuit had stayed faithful to *Rocap*, it would have found, like the district court, that the SI was a federal agency to which the Privacy Act applies. The D.C. Circuit's "substantial independent authority" test contradicts the older, more widely used "substantial federal control over day-to-day operations" test and is in clear derogation of the FOIA.[7]

II. THE DECISION BELOW, IN FOCUSING ON THE INDEPENDENT AUTHORITY OF THE SI TO DETERMINE ITS STATUS, IS IN DIRECT CONFLICT WITH THE TEST EMBRACED BY THE NINTH CIRCUIT.

Not only has the D.C. Circuit abandoned twenty years of precedent without explanation, but its analysis and result are at odds with the approach embraced by the Ninth Circuit. Such a clear disagreement between the circuit courts of appeals is appropriate for resolution by this Court.

A. The Ninth Circuit Applies A "Substantial Federal Control" Test In Defining "Agency" For The Purposes Of FOIA, Creating A Split In The Circuits Which The Court Should Resolve.

While the Ninth Circuit has not been called upon to determine whether or not the SI is an agency subject to FOIA, it has articulated its own test for defining "agency" for the purposes of FOIA. *See Irwin Memorial Blood Bank of the San Francisco Medical Society v. American National Red Cross*, 640 F.2d 1051 (9th Cir. 1981) (*Irwin*). The Ninth Circuit, cognizant of the broad reach of FOIA, realized in *Irwin* that any determination of

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[7] While the court in *Rocap* gave extreme deference to the legislative intent underlying FOIA, as did the district court below, the *Dong* court cavalierly dismissed Congress' purpose in amending FOIA: "But Congress did not back this observation with any statutory text remotely matching its scope, such as 'governmental entity,' and accordingly we stick to the text as enacted." *Dong*, 125 F.3d at 880.

agency status has to be accomplished on a particularized basis because the government has adopted a "myriad of organizational arrangements" for accomplishing the business of government. *Id.* at 1054. In contrast to the D.C. Circuit, the Ninth Circuit has favored a more flexible approach that recognizes that certain entities may be agencies even if they do not promulgate widely applicable rules or punish offenders.

In this regard, *Irwin* teaches that to qualify as an agency under FOIA, a threshold showing of *substantial federal control* or supervision must be made. *See Irwin* at 1054. That showing may be made by examining a number of indicia which manifest that control. *Id.* at 1055. The Ninth Circuit embraced a control standard because the presence or absence of federal control distinguishes agencies from organizations which are "merely quasi-public or quasi-government." *Id.*

Applying its "substantial federal control" test to the Red Cross, the Ninth Circuit concluded that the Red Cross was not an agency subject to FOIA. *Id.* at 1057-1058. Thus, while the Red Cross holds a federal charter, its employees are not employees of the United States. *Id.* at 1056. Nor does the Red Cross receive any money from the United States except in terms of government contracts and grants. *Id.* Finally, government officials do not direct the everyday affairs of the Red Cross. *Id.* Without these factors indicating federal control, the Red Cross cannot be considered an agency under the *Irwin* test.

As the above discussion indicates, the two circuit courts which have addressed the issue of statutory construction presented by §§ 552(f) and 551(1) of title V have taken entirely different, and we believe, conflicting, approaches. The underlying theoretical premises are at odds with each other, with the Ninth Circuit favoring a substantial control test coupled with an expansive reading of FOIA, while the D.C. Circuit has now adopted an "independent authority" analysis and a narrow interpretation of FOIA.

These two approaches are clearly incompatible, and the Court should use this opportunity to define the proper test by which agency status should be evaluated.

B. Application Of The Test In *Irwin* To *Dong* Produces A Result Contrary To The D.C. Circuit's Holding, Demonstrating Their Irreconcilability.

Applying the test used in *Irwin* to the instant case leads to the conclusion that the SI is an agency subject to FOIA. In *Dong I*, in this regard, the district court employed the *Rocap* analysis, which the Ninth Circuit adopted in *Irwin* is holding that the Red Cross was not an agency for FOIA purposes. *Dong I*, 878 F. Supp. at 247. The *Dong I* Court found, based on factors which indicate federal control, that the SI has more numerous and stronger ties to the federal government than either the Red Cross or the FHLMC. Thus, like the Red Cross and the FHLMC, the SI is federally chartered. 20 U.S.C. § 41. And like the FHLMC its directors are either federal officers or appointed by federal officers. *See* 20 U.S.C. § 43 (Regents of the Smithsonian). Government officials on the Board of Regents include the Vice President, the Chief Justice of the United States, three members of the House of Representatives, and three members of the Senate. *See* 20 U.S.C. § 42. Federal officials exercise significant control over all aspects of the SI. *See Dong I*, 878 F. Supp. at 248-249.

Furthermore, the SI has even stronger links to the federal government because it has a majority of civil service employees, receives representation from the United States Attorney, enjoys sovereign immunity, and benefits from federal status for taxes purposes and property transfers. *See, e.g., Expeditions Unlimited*, 556 F.2d 289, 296 (D.C. Cir. 1977) (SI qualifies for sovereign immunity); *Cotton v. Adams*, 798 F. Supp. 22, 24 (D.D.C. 1992) (discussing an array of ties between the SI and the federal government); and *Matter of Smithsonian Institution Use of Appropriated Funds for Legal Representation of Of-*

ficers and Employees, 70 Comp. Gen. 647 (July 29, 1991) (Appropriated funds not available to provide litigative services to federal employees unless Attorney General determines such representation would be in the interest of the United States).[8] Using a substantial federal control approach, the shared similarities between the FHLMC and the SI warrant the conclusion that they are both agencies for the purposes of FOIA.

Moreover, the financial ties between the SI and the federal government are far more indicative of substantial federal control than those found in *Rocap* for the FHLMC. In this regard, the budget for the SI is published by the President through the Office of Management and Budget. In contrast to the FHLMC, the SI receives funds from the Treasury Department. Those monies account for about 75% of the SI's annual operating budget, and this year the SI received $333,408,000 in appropriations, excluding additional funds for the National Zoo, National Gallery of Art, the Kennedy Center, and the Woodrow Wilson International Center for Scholars. Department of the Interior and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-83, 111 Stat. 1543, 1587 (1997). The SI's funds come from appropriations specifically marked for *related agencies*.

Numerous other indicia cstablish that the government exercises substantial control over the SI. There is no dispute that the SI must be accountable for the monies it receives from the Treasury. *See* 20 U.S.C. §§ 49, 57. The SI must also comply with Federal Managers' Financial Integrity Act, which applies to executive agencies.

[8] The very fact that the Department of Justice, through the auspices of the Solicitor General's Office, is representing the SI in this case suggests that the SI *is* an agency. *See* 28 U.S.C. § 516 (". . . the conduct of litigation in which the United States, an *agency*, or officer thereof is a party . . . is reserved to the officers of the Department of Justice. . . .). Thus, the SI is in the awkward position of using government resources and lawyers to argue that it is not a federal agency.

See 31 U.S.C. §§ 1105, 1113, 3512 (governing budget submissions and accounting procedures). The General Accounting Office (GAO) audits the SI's accounts, like those of other executive agencies. *See Cotton v. Adams*, 798 F. Supp. at 24. Finally, the Office of the Inspector General exercises financial and operative oversight over the SI. *See* the Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (1978), *amended by* Pub. L. No. 100-504, title I, 102 Stat. 2515 (1988). Therefore, under a test which relies on the quality and breadth of day-to-day federal control to determine whether or not the SI is an agency subject to FOIA and the Privacy Act, the degree of financial control the government wields over the SI clearly would establish that the SI is an agency for the Acts' purposes.

The specific purpose of the SI's enabling legislation is the final factor under the *Irwin* analysis in determining whether substantial federal control exists over the Institution. Indeed, the SI's "authority," as the term is used in § 551(1), is its authority to execute its statutory duty of preserving and studying the nation's heritage. The actual enabling legislation for the SI was the 1846 incorporation of the Institution according to the terms of James Smithson's testamentary trust. *See* 20 U.S.C. § 41. At the time, the only statutory obligation was that the SI exist for the "increase and diffusion of knowledge. . . ." *Id.* However, as the SI has become more and more of a national institution, with the federal government providing the bulk of its funding, employees, and its collections, there has been a corresponding rise in particular legislation authorizing the SI to take specific actions.

First, the SI has been made the official repository of artifacts and other objects pertaining to the nation's cultural and scientific heritage either owned by or controlled by the government. *See, e.g.*, 20 U.S.C. § 50 (". . . all objects of art and of foreign and curious research, and all objects of natural history, plants, and geological and mineralogical specimens belonging to the United States"

to be delivered to the Board of Regents); 20 U.S.C. § 59 (collections of the National Ocean Survey and Geological Survey to be deposited in the SI); 20 U.S.C. § 60 (United States Army articles to be furnished to the SI); 20 U.S.C. § 77a (National Air and Space Museum to "memorialize the national development of aviation and space flight").

Second, Congress has specified how the SI is to execute its statutory duty. In general, the Board of Regents is charged with arranging and classifying its specimens as to best promote their study and examination. *See* 20 U.S.C. § 50. Congress has also been very specific in placing conditions on the SI's exercise of its authority. *See* 20 U.S.C. § 76j(b)(2((B) (an exception to section (b)(1), which prohibited the installation of further plaques and memorials in the Kennedy Center, to permit the placement of plaques on theatre chairs). Altogether, Congress intended that it continue to wield substantial control over the SI by imposing significant financial constraints and by carefully delegating and delineating the SI's original charter.

III. THE COURT OF APPEALS' DECISION SOWS CONFUSION WITH RESPECT TO THE LONG ESTABLISHED RELATIONSHIPS BETWEEN THE SI AND OTHER AGENCIES.

Rather than settling a controversy, the D.C. Court of Appeals' holding serves only to confuse the SI's relationship with other government agencies. Finding that the SI is not an "agency" within the FOIA's definition—which is construed by virtually every court to be an inclusive one —jeopardizes the long established relationships the SI currently enjoys with the other executive agencies that oversee the SI's actions towards its employees.

A. The Petitioned-From Decision Specifically Contradicts The Federal Labor Relations Authority's Finding That The Kennedy Center, And By Extension, The SI, Is An Executive Agency.

Using a more restrictive definition than the definition of "agency" in the APA, the Federal Labor Relations

Authority (FLRA), which administers the federal sector labor-management statute, held that the Kennedy Center and the SI were *executive agencies*, thus meeting, for the purposes of the instant case, the criteria of not only § 551(1) but § 552(f), as well. Section 552(f) was the supplemental language added to FOIA as part of the 1974 amendments and defined agency to include executive departments and other establishments in the executive branch. *See* 5 U.S.C. § 552(f). Congress has defined "independent establishment" as an "establishment in the executive branch which is not an Executive Department, military department, Government Corporation, or part thereof, or part of an independent establishment." 5 U.S.C. § 104(1).

Using the § 104(1) definition, the FLRA held the SI to be an independent establishment, meaning that it was an executive agency for the purposes of Title V, which would include FOIA and the Privacy Act. The FLRA assessed the status of the SI when the Kennedy Center, a bureau of the SI, challenged the FLRA's jurisdiction to hear an unfair labor practice charge. *See The Kennedy Center for the Performing Arts and Rebecca L. Wood*, 45 F.L.R.A. 835, 836-837 (1992) (*Kennedy Center*).

First, the FLRA looked to the establishment of the SI. Citing the multitude of ties to the federal government that the petitioner and the lower court also found compelling, the FLRA concluded that the SI met the test for government agency status. *See Kennedy Center* at 845.

Next, the FLRA assessed whether or not it had jurisdiction over the federal entity that is the SI by virtue of its authority over the labor-management relations of executive agencies. The FLRA was created as part of the Federal Labor Management Relations Statute (FSLMRS) that was itself part of the comprehensive Civil Service Reform Act of 1978 (CSRA). *See* Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, §§ 7100 *et seq.* (1978). The FSLMRS covers employees in "agencies," which the statute defines as an "executive agency." 5 U.S.C. § 7103(a)(3). The FLRA supplemented the defi-

nition found in § 7103(a)(1)(3) with the general definitions for the title found at § 105, and particularly § 104 (defining independent establishment), which are the same sections used to explicate the term "agency" for purposes of FOIA and the Privacy Act.

Congress did not derive these definitions independently but instead codified the language used in the Executive Orders which had previously governed labor-management relations in the federal sector. *See* H.R. REP. No. 1403, 95th Cong., 2nd Sess. 12 (1978), *reprinted in* LEGISLATIVE HISTORY OF THE CIVIL SERVICE REFORM ACT, 1978, at 682 (1978) (LEGIS. HIST.). Originally the term "agency" in Executive Order No. 10988 referred to "agencies in the executive branch . . . in all dealings with Federal employees. . . ." Preamble, Exec. Order No. 10,988, 27 Fed. Reg. 551 (1962), *reprinted in* LEGIS. HIST., 1978, at 1211 (1978). President Kennedy's use of the term "federal employees" meant that he wanted to be inclusive; he did not use the term "executive branch employees." Under this first Executive Order, approximately 900 SI employees received union representation. *See Kennedy Center* at 847. Indeed, under the separation of powers doctrine, Executive Orders only have authority over organizations in the executive branch. Arguably, by acceding to Executive Order No. 10988 the SI was accepting its status as an entity in the executive branch.

Building upon Executive Order No. 10988, President Nixon promulgated Executive Order No. 11491 in 1970, which governed labor relations in all agencies and employees except for those specifically excluded in the Order. *See* Exec. Order No. 11491, 24 Fed. Reg. 17,605 (1970), *reprinted in* LEGIS. HIST. at 1245-1246. For the first time, "agency" was specifically defined, and it cross-referenced the definition of "independent establishment" found at 5 U.S.C. § 104. *Id.* at 1244. At this time, the number of employees at the SI represented by unions grew to over 1000, and the SI continued to be within the coverage of Executive Order 11491. *See Kennedy Center* at 848.

Considering that Congress had clearly looked to the existing Executive Order in passing the CSRA and had enumerated excluded agencies, the FLRA concluded that Congress meant for the SI to remain within the ambit of the federal labor-management relations program. *See Kennedy Center* at 851. Thus, the SI's belated contention that it is suddenly not an executive agency belies over thirty years of practice and defies Congressional intent.

B. The D.C. Circuit's Holding Potentially Undermines The Coverage Of The SI's Employees Under The FSLMRS And Other Federal Employment Law.

The FLRA's assertion of jurisdiction protects the approximately 4,000 SI employees not paid from the Smithson Trust. *See* 5 U.S.C. §§ 7100 *et seq.* According to the FLRA's General Counsel, the National Labor Relations Board (NLRB) has declined to assert jurisdiction over the Kennedy Center under the National Labor Relations Act (NLRA). *See Kennedy Center* at 842. Therefore, a finding that the SI is not an agency for FOIA or Privacy Act purposes potentially threatens coverage of the SI by the CSRA and might thereby leave the SI's employees without recourse to either private or public labor law. Because SI employees have enjoyed the rights to organize and collectively bargain since the early 1960's, as repeatedly affirmed by the afore-mentioned Executive Orders and CSRA, the instant decision sows confusion in an area where long-established precedents have affirmed the FSLMRS' applicability to the SI's majority, non-trust fund employees.

In taking the position that it is not an agency for FOIA and Privacy Act purposes, moreover, the SI both undermines federal labor-management relations and fails to appreciate the significant benefits it derives from its status as an agency, relative to its employees, if they are "agency" employees. Thus, as employees of a government agency, workers at the SI have no right to strike. *See* 5 U.S.C. § 7311(3). This is decidedly contrary to the right of private sector employees to strike. *See* NLRA § 7, 29 U.S.C. § 157; *Division 1287 of Amalgated Ass'n. of St.*

Elec. Ry. and Motor Coarch Employees of America v. Missouri, 374 U.S. 74 (1963). Also, like other federal agency employees, workers at the SI until now have been subject to the provisions of the Hatch Act, which prohibit political activity in the federal government. *See* 5 U.S.C. §§ 7322-7324. Finally, the SI enjoys the benefit of statutorily limited wages and benefits. Since its employees cannot bargain over wages or benefits, the SI reaps a significant savings each year, as federal employees in Washington, D.C. (where the majority of SI employees work), are paid, on average, 31% less than their private sector counterparts. *See* U.S. Pay Agent, *Report on Locality-Based Comparability Payments for the General Schedule, Annual Report of the President's Pay Agent* 18 (Washington: 1993-1997). *See also* Federal Employment Pay Compensation Act of 1990 (FEPCA), Pub. L. No. 101-509, § 529, 104 Stat. 1427, 1429 (1990) (calling for equalization of pay between federal and private sector workers). If the SI is not an "agency" for FOIA or Privacy Act purposes, its status as a government employer for purposes of the important limitations on employee rights may be questionable.

Furthermore, the *Dong* court's holding that the SI is not an executive agency threatens the SI's relationship to the Merit Systems Protection Board (MSPB) and the Equal Employment Opportunity Commission (EEOC). The MSPB has been responsible for assuring SI compliance with merit systems principles. *See, e.g., Hawkins v. SI*, MSPB. Docket No. DC-0752-96-0283-B-1 (March 17, 1998) (petition for review denied as untimely); *Johnson v. SI*, 74 M.S.P.R. 94 (1997). Not only has the MSPB asserted *de facto* jurisdiction by hearing and rendering decisions in SI employment cases, but it has also found itself to have *de jure* jurisdiction. In *Pessa v. SI*, for example, the MSPB explicitly held the SI to be an independent establishment and thus an executive agency for purposes of the Whistleblower Protection Act, 5 U.S.C. §§ 1221, 2302(b). *Pessa v. SI*, 60 M.S.P.R. 421 (1994). *See also Seigla v. SI*, 62 M.S.P.R. 55, 57 (1994) (SI an

agency under 5 U.S.C. § 105). A judicial determination that the SI is not an executive agency potentially subverts the jurisdiction of the agency responsible for adjudicating violations of the merit systems principles and may upset employees' reliance on the employment protection they have heretofore been entitled to as federal agency employees.

In addition to the protection offered by the MSPB, SI employees have previously depended on the EEOC to protect them from discrimination in employment. The Office of Federal Operations (OFO) of the EEOC has consistently ruled on allegations of discrimination in the SI. *See, e.g., Adams v. SI*, EEOC Appeal No. 01971599 (December 5, 1997); *Prue v. SI*, EEOC Appeal No. 01955625 (September 5, 1997); and *Penn v. SI*, EEOC Appeal No. 01956889 (July 14, 1997). However, the Secretary of the SI has intimated that the holding in *Dong* means that the SI no longer has to comply with the orders of the OFO, a move which would potentially expose thousands of SI employees to what would otherwise be illegal harassment and discrimination. *See* Jacqueline Gaulin, *Smithsonian Employees in Limbo, EEOC's Case Refusals Raise Questions About Rights*, FEDERAL TIMES, March 23, 1998 at 5 (Reporting on EEOC decision to return 40 pending EEO cases to the SI until the jurisdictional issues raised because of the D.C. Circuit's holding in *Dong* are resolved).

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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